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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 138.

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Code of 1892, of Mississippi, in sec. 3387, in the general chapter levying privilege taxes, provides as follows:

> "On each sleeping and palace car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars."

On Sept. 26, 1900, Wirt Adams, State Revenue Agent for Mississippi, brought this action in the Circuit court of Hinds

county against the Pullman Company, to recover such privilege tax for the years 1892, 1893 and 1894, under and by virtue of said provision. The plaintiff, in his declaration, alleged as follows:

> "That during the year 1892, and the year 1893, and the year 1894, the said defendant being a sleeping car company as aforesaid, operated and ran its sleeping and palace cars over and upon two thousand miles of railroad track in the State of Mississippi, upon various lines of railroad therein, and then and there offered to take and took passengers for hire upon its said sleeping or palace cars and carried them from various towns in Mississippi along its route to other and various towns in Mississippi (said traffic being wholly within the State), and so defendant carried passengers for hire upon its sleeping and palace cars from one point to another in the State of Mississippi."

The defendant pleaded the general issue and two special pleas, numbered in the record two and three. Demurrers were sustained to these two special pleas. The second plea seeks to justify the non-payment of this privilege tax on the ground that the defendant had no property nor resident agents in the State, and that it was at the same time carrying on an interstate commerce business of like kind and character, to which the local business was a mere incident. The third plea sets out the foregoing, and in addition that defendant carried on its local business at a loss, and that it was compelled to carry on such local business by the Constitution of Mississippi, which declares sleeping car companies to be common carriers. This provision (sec. 195, Constitution of 1890) is as follows:

> "Express, telegraph, telephone and sleeping car companies are declared common carriers in their respective lines of business, and subject to liability as such."

Under the plea of the general issue the cause was submitted on an agreed statement of facts, upon which the lower court instructed the jury to find for the plaintiff, first having excluded all of the evidence offered by the defendant as being an insufficient defense under the general issue. This agreed statement of facts is in part as follows:

"It is agreed between the plaintiff and the defendant in the above styled cause that for and during each of the years 1892, 1893 and 1894, the defendant's sleeping cars were carried by various railroad companies over 1536 miles of railroad track within the State of Mississippi, that such sleeping cars were under the control of the defendant, by its conductors and other employees, and that the defendant offered to take and took passengers in each of said years over said distance of said track in Mississippi, for hire, in this: That it collected fares for berths and seats upon its said sleeping cars from point to point wholly within the State of Mississippi, persons going from one point to another point within Mississippi. That the fares went to the defendant and not to the said railroad companies, who only carried such sleeping cars of defendant under a contract with it.

"That the defendant has never paid any privilege tax or had any privilege license for any of said years to the State of Mississippi. The defendant was incorporated under the laws of Illinois as the 'Pullman's Palace Car Company,' and as a sleeping car company, and that by act of the Legislature of Illinois its name was changed in 1899 to that of the 'Pullman Company,' which is its present name, both being the same corporation. No point is to be made, however, on the name. That defendant was the only sleeping car company doing business in Mississippi during said years. That upon the trial of said cause in said court the de-

fendant offered evidence to show that its receipts from persons going from one point in Mississippi to another therein, did not equal during said years its expenses properly chargeable against such receipts. To the introduction of such evidence the plaintiff objected, and his objection was by the court sustained, and that defendant then and there instantly excepted, and its exceptions were allowed."

Thereupon final judgment was entered for the plaintiff, and defendant appealed to the Supreme Court of Mississippi, where the judgment of the lower court was affirmed. Whereupon the defendant, the Pullman Company, appealed to this court.

ARGUMENT.

I.

At the outset we desire to concede that the tax levied by the provision under discussion, is a tax levied on the business and not on the property of plaintiff in error; that it is a license or privilege tax, and not a property tax. We concede further, that if this tax had been levied generally on the business of sleeping car companies, without discrimination or limitation, that it might have been unconstitutional, under the decisions of this court. We concede further, that if this tax on the local business had been levied in such form and manner that a company carrying on an interstate business, of like kind and character, would necessarily become liable to pay the local tax by virtue and in consequence of undertaking to carry on its interstate business, then such tax would be unconstitutional. But we insist that no such case is here presented. By express terms of the statute, and by the interpretation given to it by the highest tribunal in the State, in this very case, the tax is confined and limited to and imposed on the local business, alone, of sleeping car

companies. And by the application given to the statute by the Supreme Court of the State, all the plaintiff in error had to do to avoid the tax was to decline to receive passengers going from one point to another within the State. Nor is there anything in the nature of the business done by plaintiff in error, nor in the form and manner in which the tax is levied, that would prevent it from separating and segregating the one from the other, its interstate from its local business, and continuing either or both as it saw fit.

We do not believe that any case, either Federal or State, can be found denying the right of a State to require a privilege license of a foreign corporation to do a purely local business, even though such corporation may, for the most part, be engaged in an interstate business of like character and kind, where the tax so levied is confined strictly to the local business, either by the express terms of the statute, or by the construction of the courts.

We insist that the case of *Osborne v. Florida*, 164 U. S., 650, is conclusive of all of the serious contentions urged in this case. In that case, it was shown that the State of Florida had imposed a license or privilege tax on "all express companies doing business in this State," and the agreed statement of facts is in part as follows:

> "That the said F. R. Osborne is the agent of the Southern Express Company, and that said company is a corporation created, existing and being under the laws of the State of Georgia; that said Southern Express Company is doing a business in the State of Florida ordinarily done by express companies in the United States of carrying goods and freight for hire from points within the State of Florida to points in said State, and also of carrying goods and freights for hire from points within the State of Florida to points without the State of Florida in other States in divers parts of the United States, and in carrying goods and freight

for hire from points in other States of the United States to points within the State of Florida, and that it has been engaged in such business for more than twenty years, and was so engaged on the 3d day of October, 1893; that of the business done by the Southern Express Company 95 per cent. thereof consists of traffic carrying of goods and freights from the State of Florida into other States, and bringing and carrying from other States of the United States to points within the State of Florida, and 5 per cent. thereof consists of carrying goods and freights between points wholly within the State of Florida; that F. R. Osborne did knowingly act as the agent of said Express Company on the 3d day of October, 1893, in the city of Jacksonville, Duval county, Florida, a city having more than 15,000 inhabitants, the said Southern Express Company having then and there failed and refused to pay the license tax as required by article 12, section 9, of an act entitled, 'An act for the assessment and collection of revenue,' of the laws of Florida, approved June 2, 1893; that the Southern Express Company does business in and has agents in more than one town in nearly every county in the State, and that said towns differ in population, and that it has an office, an agent and does business in Polk county, Florida, in the following incorporated towns, with a population as follows: * * *"

Upon which this court said:

"The Supreme court of Florida has construed the ninth section of this act and has held in express terms that it does not apply to or affect in any manner the business of this company which is interstate in its character; that it applies to and affects only its business which is done within the State, or is, as it is termed, 'local' in its character, and it has held that under that statute so long as the express company confines its oper-

ations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question. It has added, however, that under the provision of the statute, if the company engage in business within the State of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute as construed by the Supreme court of Florida does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution.

"The case of *Crutcher v. Kentucky*, 141 U. S., 47, is not in the slightest opposed to this view. The act which was held to be in violation of the Federal Constitution in that case prohibited the agent of a foreign express company from carrying on business at all in that State without first obtaining a license from the State. The company was thus prevented from doing any business, even of an interstate character, without obtaining the license in question. The act was held to be a regulation of interstate commerce in its application to corporations or associations engaged in that business, and that subject was held to belong exclusively to national and not State legislation.

"It has never been held, however, that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the

State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the State statute. It was stated by Justice Bradley, in the course of his opinion in the Crutcher case, that: 'Taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection,' viz., an objection that the tax or license was a regulation of, or that it improperly affected interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the State court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."

There is nothing in the business of sleeping car companies to differentiate it from the business of express companies so far as the taxing power is concerned. Surely it cannot be

seriously urged, that merely because a local business is carried on by transient and shifting instead of resident agents, and that it is carried on without the aid of fixed and tangible property that can be reached by ordinary methods of taxation, and that it maintains no local office and has no local habitation, yet persistently and continuously receives the protection of the laws and accepts the money of the people, with whom, and amongst whom it transacts such local business, can give it any higher right to exemption from such taxation, than its neighbor who becomes a part and parcel of the people upon whom it lives and prospers. We find no warrant for any such distinction in any judicial decision. Certainly there is nothing in the case of *Pickard v. Southern Car Co.*, 117 U. S., 34, so much relied upon by plaintiff in error to justify such contentions. It will not do to take an isolated sentence from an opinion, separate it from the context, and without having in view the facts of the particular case about which the court is always presumed to be talking, to construct an elaborate theory, as the plaintiff in error seeks to do in considering the effect of the Pickard case. It is true that Judge Bradley does say in his opinion in that case, "and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege." But this is but a part of the clause relating to the matter, and when the entire clause is read the meaning of this able Judge is at once made clear and explicit. The preceding part of this sentence to which the latter half refers and relates, is as follows: "As such vehicle of transit, *the car so far as it was engaged in interstate commerce*, was not taxable by the State of Tennessee, because the plaintiff had no domicile in Tennessee, and was not subject to its jurisdiction for purposes of taxation, and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege." The words italicized by us denote the pith and

point of the whole opinion, and make clear the meaning of the Court.

But at last the force and effect of a decision is determinable by the facts of the particular case, and the language of the opinion is restrained and limited thereby. A careful examination of that case will show that the act there under consideration sought to impose a tax of $50.00 upon each and every car operated by a sleeping car company, whether such car was engaged in local or interstate business. Since no distinction was made between cars used in carrying on local business and cars used wholly or partly in carrying on interstate business, it was impossible under that act for the sleeping car company to operate a single car for carrying on its interstate business without becoming liable to pay this privilege tax, since the tax was so much *per car*, without regard to what kind of business it was engaged in. This Court properly held that the act imposed a tax on the business and not a tax on property, and as no distinction was made in cars used in carrying on interstate and local business, that it was directly a burden on and taxation of interstate commerce, and therefore unconstitutional. Under the terms of this act imposing this tax at so much per car without any further limitation or restriction, if the company had discontinued its local business entirely it would have been liable for the license on every car operated by it in carrying on its interstate business. It will be further noted from the statement of facts in this case, that there were three cars operated by said company between Memphis and Nashville, which were operated solely in the local business, and the company paid this license, on these three cars, without question.

That case cannot affect the case at bar, for under the act now under consideration no license is required, if no local business be done. The act itself separates and differentiates the two classes of business, clearly and distinctly.

II.

But it is said that defendant carried on its local business at a loss, and that by the Constitution of Mississippi it is declared to be a common carrier, and hence is first compelled to do the local business, which is done at a loss, and then to pay a privilege tax for so doing, and concludes that such result makes the tax unconstitutional in that it indirectly burdens its interstate business.

To this contention we reply, (1) that the constitutional provision declaring the plaintiff in error a common carrier, imposes no greater burden on it, so far as the taking of local business is concerned, than was imposed at common law, for while sleeping car companies may not be common carriers for all purposes, and while they have been by some courts held to be carriers, by others inn keepers, and by others neither, but a sort of hybrid between the two, yet all concur in holding that they are *quasi* public concerns, in so far as that they must serve all alike; (2) that the constitutional provision in question making them common carriers does not require them to do any more, so far as this case is concerned, than they would have been required to do at common law; that its duty as common carrier is not to do all kinds of carrying business, but to serve all persons alike in the kind of business it elects and offers to do. It is clearly competent for any common carrier, even a railroad company, to restrict its business to interstate business, if it see fit, provided the local business be not profitable. Even a railroad company can, upon reasonable grounds, select the kind of business it will undertake to carry on, but once having made such selection, it must serve all persons, of like class, alike. It seems clear that this constitutional provision making the plaintiff in error a common carrier, does in nowise affect its right to decline to do a local business, if such local business be unprofitable. Its right, like the right of

every other common carrier, now and still is, to classify the business it will engage in, upon any reasonable basis, and when thus reasonably classified and limited, to serve all persons alike, within such limitations.

Hale on Bailments, page 322, states the rule as follows:

> "The duty of a common carrier to carry for all who offer arises from the public profession he has made, and is limited to it. A person may profess to carry a particular description of goods only, as, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be compelled to carry to or from intermediate places. But to the extent of their public profession, common carriers must carry for all who offer."

And cites the following authorities in support thereof:

> "*Johnson v. Railway Co.*, 4 Exch., 367; *Central R. & B. Co. v. Lampley*, 76 Ala., 357; *Honeyman v. Railroad Co.*, 13 Or., 352, 10 Pac., 628; *Kimball v. Railroad Co.*, 26 Vt., 247; *Pitlock v. Wells, Fargo & Co.*, 109 Mass., 452; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, 33, Fed. Cas. No. 2, 730; *Sewall v. Allen*, 6 Wend., 335, 346; *Kuten v. Railroad Co.*, 1 Bliss, 35, Fed. Cas. No. 7, 955. Carriers of money: *Shelton v. Robinson*, 7 N. H., 157; *Kemp v. Coughtry*, 11 Johns., 107, 109; *Emery v. Hersey*, 4 Greenl., 467; *Harrington v. McShane*, 2 Watts (Pa.), 443; *Merwin v. Butler*, 7 Conn., 138; *Dwight v. Brewster*, 1 Pick. (Mass.), 50."

III.

But if the contention of plaintiff in error be correct, that under the laws of Mississippi it is compelled to do this local business and at a loss, and that thus its interstate business is indirectly burdened, then its remedy is to refuse the local business on that ground, for it is the law declaring sleeping car companies common carriers that, in that event, would be unconstitutional and void, and not the law fixing the license tax. It does not lie in its mouth to first do the local business and get all the profit out of such business, if there be any, and then to refuse to pay the tax if it fails to be profitable, to accept all the benefits and decline all the burdens. The law requiring the local business to be done at a loss, must be attacked and resisted, and not the law requiring the tax to be paid.

IV.

The contention that because this tax indirectly affected and burdened the interstate business of plaintiff in error, it is invalid, seems to be wholly without merit. Any tax levied for any purpose would necessarily have that effect on the business of every person who happened to be engaged in both local and interstate enterprises.

In the case of *Adams v. Telegraph Co.*, 71 Miss., 565, which case was affirmed on appeal to this court, the Supreme court of Mississippi says:

> "Every tax is a burden, and, to the extent imposed, is an interference with the pursuit or business upon which it is laid. If the business is partly interstate commerce, then that commerce is incidentally affected and interfered with by every tax, of any nature whatever, that may be levied on it.
>
> "In the case at bar there is no direct burden upon

interstate commerce; there is no further interference with it than will be found necessarily to result from the imposition of any burden of taxation in any shape."

The tax in the above case was a privilege license upon the business generally of a telegraph company, and was not limited by its terms to the local business as in the case at bar. If it be permissible to levy a privilege tax as in that case, so much the more can it be done as in this case, by limiting such tax strictly to the local business.

In view of the recent announcements from this court, we do not believe that it will be seriously contended here, that a State has no authority to require a privilege tax of a foreign corporation doing a local business in such State, even though such tax may indirectly affect its interstate business. This court in the case of *L. & N. Railroad Co. v. Kentucky*, 183 U. S., 518, disposes of this question of the validity of a tax that only indirectly affects interstate commerce, as follows:

"The final contention that paragraph 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long.

"It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.

"It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result

is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the mere incidental effect of enforcing the police powers of a State.

"*New York, State E. & W. R. Co. v. Pennsylvania*, 158 U. S., 431, 439, 39 L. ed., 1043, 15 Sup. Ct. Rep., 896.

"*Henderson Bridge Co. v. Kentucky*, 166 U. S., 150, 41 L. ed., 953, 17 Sup. Ct. Rep., 532.

"A discussion of this subject will be found in the opinion of this court in *Louisville & N. R. R. Co. v. Kentucky*, 161 U. S., 701, 40 ed., 859, 16 Sup. Ct. Rep., 714, where the same conclusion was reached."

We also respectfully refer this court to the able opinion of the Supreme Court of Mississippi in this case, to be found in the record (p. 16), and also in 78 Miss. Rep., p. 814.

We ask that the judgment of the lower court be affirmed.

Respectfully submitted.

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